15990

No. ~~15590~~

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Appellant,

vs.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

This is an appeal from a final Order dismissing Appellant's Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action. Reference is made to the Petition (R. 3), the Return to the Writ of Habeas Corpus and Answer to the Petition (R. 27) and the Order dismissing the Petition and

discharging the Writ (R. 35).*

The jurisdiction of the District Court was invoked under Title 28, USC, Section 2241, 62 Stat. 964, and Title 5, USC, Section 1009, 60 Stat. 237.

The jurisdiction of the Court of Appeals is invoked under Title 28, USC, Section 2253, 62 Stat 967, and Title 28, USC, Section 1291, 62 Stat. 929.

The validity and interpretation of the following statute of the United States is involved: The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, now Section 1251 (a) (6) (c), Title 8, USC.

STATEMENT OF THE CASE

Appellant is an alien, born in Finland, November 24, 1908. He entered the United States in 1909 and has resided in this country continuously since then. He is duly registered under the Alien Registration Act (Tr. 4, 5).

Appellant has resided in Portland, Oregon for about 33 years where he follows the trade of painting (Tr. 186). He is the only surviving son of his parents, a brother having been killed during World War II on a ship near Wake Island (Tr. 172). Appellant himself was drafted in 1944 and served 95 days in the Army, receiving an Honorable Discharge for medical reasons (Tr. 8, 9).

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* In this Brief, "(R....)" refers to the printed record of proceedings in the U. S. District Court, and "(Tr....)" refers to Exhibit 1, the typewritten transcript of the hearings before the Immigration and Naturalization Service.

On June 17, 1952, a warrant for the arrest and deportation of Appellant was issued by John P. Boyd, District Director of the Immigration and Naturalization Service and the same was served upon Appellant on or about September 12, 1952. The basis of the warrant was the allegation that Appellant had been a member of the Communist Party of the United States after entry into the United States during the years 1937-39.

A hearing was held before Louis C. Hafferman, Special Inquiry Officer on May 11, 1953 in Portland and thereafter, Mr. Hafferman issued a written decision holding Appellant deportable. A timely appeal to the Board of Immigration Appeals of the Department of Justice was taken and on September 8, 1953, said Board issued an order dismissing the appeal.

On February 2, 1955, pursuant to motion of Appellant, a further hearing was held before Mr. Hafferman on Appellant's application for suspension of deportation. Suspension was denied, and the Board of Immigration Appeals affirmed the ruling.

On December 13, 1954, Appellant filed a Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action in the U.S. District Court for the District of Oregon. On March 6, 1956, the Court dismissed the suit. An appeal was taken to this Court (No. 15061), *Niukkanen vs. Boyd,* 241 F.2d 938, where the District Court was affirmed. A petition for a writ of certiorari to the Supreme Court was denied December 16, 1957. 2 L. Ed. 2d 259.

In this suit Petitioner challenged the constitutionality of the statute under which he was arrested; asserted that there was insufficient evidence in the record to support deportation; and maintained that the denial of suspension of deportation was arbitrary and an abuse of discretion, and in violation of the law.

In the meantime, on December 9, 1957, the Supreme Court decided the case of *Rowoldt vs. Perfetto,* 355 U.S. 115, 2 L. Ed. 2d 140, in which the Court voided the deportation order of an alien because his admitted association with the Communist Party was not shown to have been of a "meaningful" political nature.

Thereafter, Petitioner filed a motion with the Board of Immigration Appeals requesting a new hearing on the question of the nature of his alleged association with the Communist Party, and in that proceeding he asserted that the record, as it stood, would not support the conclusion that he had a meaningful political association with the Communist Party. The Board on March 6, 1958, denied the motion and filed an opinion which is part of Exhibit 1, the Immigration and Naturalization Service file.

On April 3, 1958, Petitioner was notified by Mr. Ernest Hover, then District Director of the Immigration and Naturalization Service, to surrender in four days for deportation to Finland. The following day, a Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief was filed in the District Court, alleging that the administrative order of March 6, 1958 was arbitrary, capricious and not supported by substantial evidence in

the record; that he has been denied a fair hearing on the question of whether his alleged membership in the Communist Party was a meaningful political association within the scope and meaning of *Rowoldt v. Perfetto;* that the statute under which respondent seeks to deport Petitioner is unconstitutional because it is a bill of attainder, an *ex post facto* law, a violation of due process of law, and an infringement upon freedom of speech (R. 3-23).

A hearing on the Petition was held in District Court on April 10, 1958. On April 14, 1958, the Court entered an Order dismissing the Complaint and discharging the Writ of Habeas Corpus theretofore issued (R. 46, 35). A Notice of Appeal was filed the same day (R. 36). The Trial Court refused to restrain the Government from deporting Petitioner pending the outcome of the appeal, nor would it enlarge him on bail (R. 81, 86).

Application was made to this Court for a restraining order and enlargement on bail, which was granted April 22, 1958.

This appeal involves the following questions:

1) Whether Petitioner's alleged association with the Communist Party, on the record of this case, was "meaningful" and "political" within the rule of the Rowoldt case:

2) Whether the Act under which Petitioner has been ordered deported is unconstitutional.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to declare null and void the Order of Deportation issued by the Immigration and Naturalization Service, because the alleged membership of Petitioner in the Communist Party was not meaningful or political as defined in *Rowoldt v. Perfetto,* supra.

2. The District Court erred in failing to declare unconstitutional the Act of October 16, 1918, as amended by the Act of June 28, 1940, as amended by the Internal Security Act of 1950, now Section 1251 (a) (6) (c), U.S. Code.

ARGUMENT

The District Court erred in failing to hold null and void the order of deportation issued by the Immigration Service, because the evidence shows that the alleged membership of petitioner in the Communist Party was, if the Government's testimony be taken at face value, not a meaningful political association as required by the rule of Rowoldt v. Perfetto.

In *Galvan v. Press,* 347 U.S. 522, the Supreme Court stated the test to be applied in determining whether membership in the Communist Party had been established for the purpose of deportation:

> "There must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization. . . .'" 347 U.S. @ 528.

Thereafter, the Board of Immigration Appeals considered any proof of membership in the Communist Party as sufficient to sustain an order of deportation. *Matter of G.,* File No. 4-524774. The Board deemed adequate for this purpose the testimony of paid witnesses that an alien had been seen at closed Communist meeting, and had been observed paying dues. No proof of politically-conscious acts was required as a basis for deportation. Rather, the motives and knowledge of Communism of an alien relative to his alleged membership in the Communist Party were considered wholly irrelevant. By such means was a harsh and primitive law made even more cruel in application.

But in *Rowoldt v. Perfetto,* 355 U.S. 115, the Supreme Court reiterated the test laid down in *Galvan* and indeed went somewhat further by requiring that an order of deportation be supported by "substantial" proof that an alien had a "meaningful association" not wholly devoid of "political implications."

It follows that if the record in this case contains as little proof of "meaningful association" with the Communist Party by appellant as did the record in *Rowoldt,* appellant is entitled to a judgment voiding the order of deportation. We therefore propose to compare in detail the evidence recited in the *Rowoldt* opinion with that given by government witnesses in the case at bar. However, we would have this Court bear in mind that of the testimony of the two government witnesses, one, Knipe, was discounted by the Board of Immigration Appeals because of the lack of veracity he displayed at

the hearing (Tr. 76 ff.), and the other, Wilmot, must also be considered unreliable because he drank to excess (Tr. 48-50). In addition, appellant testified that he was never a member of the Communist Party and was and is loyal to the United States (Tr. 198, 203, 204, 220; R. 54). On the other hand, Rowoldt's connections with Communism were admitted in his own testimony.

The testimony offered by the government in this case relative to the period of appellant's alleged membership in the Communist Party is not definitive, but it can be inferred that he was a member from 1936 to some time in 1939 (Tr. 14, 19). Rowoldt admitted being a member for about a year (355 U.S. 116-117; 128-129).

Rowoldt admitted, and there was government testimony that appellant attended Communist Party meetings and paid membership dues (Tr. 14, 15, 17, 19, 22, 25, 26, 67, 69; 355 U.S. 116-7). Rowoldt worked in a Communist Party bookstore in which Communist and Marxist literature was sold (355 U.S. 118, 120); appellant is supposed to have helped circulate the "Labor New Dealer", of which Wilmot was the editor, but which was published by the Congress of Industrial Organizations (Tr. 15, 19, 20).

Rowoldt demonstrated a high degree of sophistication concerning Communism and the history of the Russian Revolution (355 U.S. 129-30). On the other hand, appellant was and apparently still is ignorant of Communist history and theory, even according to a government witness (Tr. 70, 75, 201, 202; R. 61, 62).

As for his reasons for joining the Communist Party, Rowoldt testified that they were his concern to improve economic conditions during the depression (355 U.S. 117-118). Appellant's motives for his alleged association with Communism were equally pure, even according to his accusers. Knipe testified that he was primarily concerned with problems of relief, unemployment and welfare—"bread-and-butter" issues, and that the political doctrine of overthrow by force and violence was never advocated by appellant (Tr. 72, 75).

With respect to possible leadership roles, there is no indication in the Rowoldt opinion that the alien participated as a leader. In the record in this case, the evidence of leadership is somewhat confused. Wilmot testified that appellant was possibly a "functionary" (Tr. 15) and that he was in the "top fraction" of the party (Tr. 27), without providing any definition of these terms. Knipe, however, denied that appellant was a "functionary" (Tr. 68) or that he held an office (Tr. 66, 68) other than in a passing reference to his being on the executive board of a branch (Tr. 68). There was no evidence that appellant performed any functions as a member of this board, or what such functions were supposed to be, or indeed, if he ever assumed the office knowingly. Moreover, the record is silent as to how long he may have been on this "board", how many others were members thereof, or as to any other information concerning it.

Nowhere in the record is there the slightest bit of evidence that appellant, if he was a Communist Party member, was aware or interested in its political, as dis-

tinct from economic or welfare, theories or activities.

The District Judge attempted to avoid the impact of the *Rowoldt* case by pointing out that Rowoldt admitted party membership and appellant did not (R. 77, 82). This is, however, a difference without a distinction; the question is not whether appellant admitted anything, but what evidence there is in the record which tends to prove that he had a meaningful association with Communism not wholly devoid of political significance. As this record lacks such evidence, the order of deportation against appellant should be declared null and void.

The Act Under Which the Government Seeks to Deport Appellant Is Unconstitutional

Not wishing to waive any constitutional rights, appellant reasserts his contention that Section 1251 (a) (6) (c), of Title 8, USC is unconstitutional because it violates the First Amendment which guarantees freedom of speech and association, the Fifth Amendment's provision for due process of law, and Article I, section 9(3) which prohibit bills of attainder and ex post facto laws.

In the interests of brevity, appellant will not restate his arguments on these points, but rather, he respectfully refers the Court to his briefs in the prior appeal, Niukkanen v. Boyd, No. 15061, and adopts by reference those portions of that brief dealing with the constitutional questions.

CONCLUSION

In the oral opinion of the District Court rendered April 14, 1958, it was remarked that "the law under which the Petitioner is being deported is a harsh one, but this is a matter for the legislative branch of the Government and is outside the power of the Court" (R. 85).

We would add, however, that the Courts are not impotent to block both abuses of administration and violations of the Constitution by Congress. In our form of government, the Courts are often the last hope of fairness. Here an alien who has resided among us peacefully and honorably, who served his country to the best of his ability in war, and against whom not one overt act of disloyalty or infidelity has ever been charged, much less proven, is under threat of deportation by a few relentless governmental officials who have singled out, for some unknown reason, this harmless person to receive the full brunt of a barbaric law.

The testimony adduced to justify this course of action comes from witnesses who hardly deserve the label "unimpeachable". But especially unfair is the imposition on appellant of a penalty for a political offense where, at most, his alleged association with Communism was motivated by a simple, human desire to gain better working conditions, unemployment compensation and relief for himself and others driven to despair by a vast economic depression.

Are the Courts indeed powerless to do justice on such a record? We think not, and therefore urge that the judgment be reversed, or at least, that a new administrative hearing be ordered. See *Schleich v. Butterfield,* 252 F.2d 191, 356 U.S. 971.

Respectfully submitted,

NELS PETERSON and
GERALD H. ROBINSON,
Counsel for Appellant.

APPENDIX

EXHIBIT NUMBER	OFFERED	ADMITTED
No. 1	(R. 66)	(R. 67)